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in the
Supreme Court
of the
United States

October Term, 1980

Gustavo Castillo,

Petitioner

vs.

Donald D. Forsht,

U.S. Marshal

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This is a petition for Writ of Certiorari by petitioner Gustavo Castillo from orders of the United States Court of Appeals for the Fifth Circuit denying his request for *habeas corpus* relief to prevent his extradition to Mexico for prosecution on charges of murder, attempted murder and attempted kidnapping. The questions thereby arising are:

1. Whether twice removed hearsay evidence satisfies the probable cause requirement of Title 18 U.S.C. §3184 when the evidence consists of: a third party's version (as distinguished from a "deposition") of an alleged photographic identification made from a photocopy of a passport photo in Mexico, by the purported victim of a kidnap attempt, who previously stated that he was unable to describe his assailants, and which alleged identification is not supported by independent evidence linking it to its maker; and whether said evidence should be found, as a matter of law, to be facially defective, so as to give rise to the court's duty to consider the weight and credibility of such evidence in the determination of probable cause, the failure of which is a reversible abuse of discretion.

2. Whether the probable cause standard defined in Title 18 U.S.C. §3184 and applied by this Court in *Fernandez v. Phillips*, 268 U.S. 311 (1925) requires mandatory consideration of the weight and credibility of the evidence, or whether such consideration is wholly within the unreviewable discretion of the extradition magistrate; and what standards of admissibility and competency of evidence are to be applied by the federal courts in international extradition proceedings.

3. Whether, as a matter of law, evidence secured by agents of a foreign sovereign through use of torture should be inadmissible in determining probable cause; and whether the Court should at least test the weight and credibility of such evidence.

4. Whether the political offense exception to extradition should encompass a revolution, armed rebellion or civil strife which is in the nature of an ongoing, sporadic opposition movement.

5. Whether the Court of Appeals committed plain error by failing to consider the humanitarian issues raised by petitioner concerning the strong likelihood that he will suffer political persecution and physical abuse and torture in the event he is extradited to Mexico.

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OPINIONS BELOW

The opinion of the court of Appeals appears at 623 F.2d 1098 (1980) Appendix A, *infra,* p.p. 1-21. The opinion of the United States District Court, Southern District of Florida is unreported. The Court of Appeals affirmed the judgment of the District Court.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1980. See Appendix A, p. 22, *infra.* The petition for rehearing was denied on September 29, 1980. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §2241.

LIST OF ALL THE PARTIES TO THE PROCEEDINGS BELOW

Gaspar Eugenio Jimenez Escobedo,
petitioner-appellant

v.

United States of America,
respondent-appellee
(No. 79-1480),

Gustavo Castillo,
petitioner-appellant

v.

Donald D. Forsht, U.S. Marshal,
respondent-appellee
(No. 79-1490).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

Extradition Request: On December 8, 1977 the extradition of petitioner Gustavo Castillo and Gaspar Eugenio Jiminez Escobedo (who is not a subject of this petition), both of whom are United States citizens, was requested by the Government of Mexico pursuant to the United States-Mexico Extradition Treaty of 1899, 31 Stat. 1818, T.S. 242 (hereafter Treaty). *Evidentiary hearing:* On May 18, 1978 an evidentiary hearing was held before a United States Magistrate pursuant to 18 U.S.C. §3184, who determined that both individuals were requested by Mexico on the basis of the treaty, that the crimes for which they are sought are extraditable offenses under the Treaty, and that probable cause existed to support the extradition request; and on May 31, 1978 a Certificate of Extraditability and Order of Committment was issued for petitioner Castillo and for Escobedo. *Petition for Writs of Habeas Corpus:* On June 21 petitioner Castillo and Escobedo, respectively, filed separate petitions for writs of *habeas corpus*, seeking to prevent their extradition. On December 26, 1978 the Federal District Court for the Southern District of Florida entered orders dismissing the two petitions. *Proceedings in the United States Court of Appeals:* The Fifth Circuit affirmed the district court's order denying the *habeas corpus* petitions as to both petitioners, although the evidence was different as to each petitioner. The court held that (1) probable cause existed to believe that petitioners had committed the alleged offenses even though there was in evidence, of a confession

obtained by torture; (2) that, in effect, the probable cause was based on the twice-removed hearsay evidence of a photographic identification allegedly made by a victim and presented as part of the extradition documents submitted by the requesting state; (3) that even though the relators were politically motivated in their conduct, the evidence did not demonstrate the existence of a violent political disturbance in the course of which and as an incident of which the alleged offenses were committed and that, therefore, the political offense exception to extradition was inapplicable; (4) that executive discretion to grant extradition did not violate the due process clause of the Fifth Amendment, despite the absence of guidelines; (5) that the refusal by Mexico to extradite its nationals did not preclude United States courts from granting extradition of U.S. citizens to Mexico, as modification of that practice, which is at variance with the Treaty, is a matter for the executive; and (6) that the likelihood of political persecution and other humanitarian considerations lies exclusively within the determination of the executive. The opinion and judgment of the Court of Appeals is the subject of the instant petition.

It is alleged by the Mexican Government that in July, 1976, petitioner Castillo, a naturalized U.S. citizen of Cuban origin, along with Escobedo and Orestes Ruiz Hernandez, who is now imprisoned in Mexico, travelled to Merida, Mexico and that they planned and attempted to kidnap the Cuban Consul in Merida, Daniel Ferrer Fernandez and exchange him for Cuban political prisoners. During the alleged attempt, it is asserted that the Consul's driver-bodyguard was shot and killed; that shots were fired at the Consul, but that the Consul and

the assailants escaped; that Escobedo was arrested by Mexican authorities and subsequently escaped while Ruiz, who was also arrested, remains in custody in Mexico; that petitioner Castillo was never arrested by Mexican authorities and is and has been in the U.S. and is now in the custody of U.S. Marshal Donald D. Forsht. The Mexican Government subsequently sought the extradition of petitioner for the alleged offenses of murder, attempted murder and kidnapping.

At the extradition hearing, the various documents introduced to establish probable cause included, *inter alia*, a xeroxed copy of petitioner Castillo's passport photo allegedly shown to Merida's Cuban Consul Fernandez and which was allegedly identified by him to unidentified Mexican law enforcement personnel. The "deposition" purportedly given by Consul Fernandez and in which petitioner was said to have been identified as one of the attackers was not presented among the extradition documents, nor was there any deposition or statement by the Mexican officer who allegedly took the deposition of the Cuban Consul. There was instead nothing more than a third party's report that such a deposition was taken on the day of the attack. The documents presented further indicated that petitioner Castillo's passport was found in Escobedo's luggage at the time of Escobedo's arrest.

The Government also introduced in evidence over counsel's objections the torture-coerced statements of Escobedo and Hernandez, which implicated petitioner Castillo in the alleged crimes. That these statements were obtained by torture was determined and documented in a written statement given Mr. Juan Ramirez (an American attorney) and Mr. Jeffrey Weiner (counsel

for petitioner) during a private interview with Hernandez while he was incarcerated in Mexico, prior to the evidentiary hearings in this case. These statements of Mr. Hernandez are part of the record. Hernandez described repeated acts of torture by the Mexican police. In particular, he was subjected to electrical shocks applied to his genitals and other parts of his body. The electrical shocks were administered by means of a steel chain with a ring at one end. His toe and his penis were at different times placed in the ring, and his body was wetted so as to reduce resistance to the electric current. The shocks were inflicted upon Hernandez while he lay naked and blindfolded. That treatment continued for one night and was intended to extract a confession from Hernandez, which confession the U.S. government in these proceedings asked the U.S. courts to accept unequivocally as trustworthy and voluntary.

Francisco Carmargo, also imprisoned in Mexico at this time (and whose testimony also is part of the record) substantiates the torture of Escobedo. While in jail, Carmargo attested to the fact that he heard screaming, and upon seeing Escobedo after the screaming was heard he learned that it was Escobedo who screamed during the course of being tortured. Escobedo told Carmargo of being tortured, beaten and electrically shocked by the interrogating Mexican police. Carmargo stated that he heard repeated yelling and screaming; that he remembered hearing "No, no, no don't do that." Escobedo also told Carmargo that after being tortured, he submitted to police demands and made statements allegedly incriminating himself and petitioner Castillo. The tortured "confessions" were not considered by the Fifth Circuit in the probable cause determination, leaving the twice-removed uncorroborated hearsay statements

of the Cuban Consul as essentially the primary evidence upon which the finding of petitioner's extraditability was based. Castillo's passport was purportedly found in Escobedo's luggage when he was arrested in Mexico. The Fifth Circuit held that "this evidence establishes probable cause to believe that [petitioner] committed the crimes charged." 623 F.2d at 1102. The court failed to inquire into the weight and credibility of that evidence.

Finally, it was argued by petitioner at the extradition hearing that such crimes as Mexico alleged were motivated by political ideology and were to be regarded as part of an ongoing albeit sporadic struggle against the Marxist dictatorial regime dominating Cuba. The political and ideological motivation for those acts is evidenced by the history of the petitioner's anti-Castro activities in the U.S., the nature of the act (the alleged kidnap attempt of the Cuban Consul in Merida), the complex operation allegedly committed by petitioner and others, the extraordinary personal risks involved in such an alleged scheme, and the expressed desire of petitioner and others to strike a blow against Castro and Communism. Any individual who engaged in such a struggle, petitioner argued, would be acting out of political conviction and to effectuate political reform with no thought of personal gain.

REASONS FOR GRANTING THE WRIT

1. *A photographic identification introduced into evidence by means of twice removed hearsay testimony unaccompanied by an affadavit establishing a link to its maker is insufficient to establish probable cause.* At the extradition hearing the evidence incriminating petitioner consisted primarily of the unconfirmed

statement of a Mexican official who stated that another Mexican official was first told by the Cuban Consul that he (the Cuban Consul) could not describe his assailants, but subsequently the same Consul allegedly recognized a photocopy of petitioner's passport photograph. No affadavit or other statement by the Consul or by the Mexican official to whom he spoke was introduced in the record to verify or corroborate the testimony of the third party statement relied upon at the extradition hearing. There is, in short, nothing more than the unsupported statement of that official who had no direct knowledge of the occurrence of the alleged identification or of the victim's alleged account thereof.

Petitioner is cognizant of the well-established practice that no affadivit is required to corroborate photographic identification in extradition proceedings, nor is affadavit evidence required generally for probable cause purposes. See *Collins v. Loisel*, 259 U.S. 309 (1922); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973), cert. dis. by agreement of parties, 414 U.S. 884 (1973). Nevertheless, the facts presented in the instant petition raise the issue of the weight and credibility to be accorded to such evidence in extradition hearings, a question not heretofore considered by this Court. Petitioner maintains that while questions of weight and credibility are within the discretion of the extradition magistrate, the evidence here presented by the Mexican government is on its face so questionable as to give rise to an abuse of discretion where the court expressly fails to consider weight and credibility. The inherent deficiencies of that evidence create such substantial doubt as to its credibility that reasonable grounds to believe that petitioner committed or was in any manner implicated

in the alleged offenses could not as a matter of law be deemed sufficiently established notwithstanding the discretion of the extradition magistrate. Thus, petitioner maintains that the court's failure to expressly consider the weight and credibility of the Mexican documents worked a significant deprivation and in effect prevented petitioner from demonstrating the absence of probable cause. It should, therefore, be considered a reversible abuse of discretion. See *Collins v. Loisel, supra; Sayne v. Shipley,* 418 F.2d 679 (5th Cir. 1969); *Freedman v. United States,* 437 F. Supp. 1252 (N.D. Ga 1977).

The Fifth Circuit correctly stated that weight and credibility should be considered and that United States courts require competent evidence, but it failed to state whether it was relying on a standard requiring mandatory consideration of weight and credibility or one which leaves that consideration to the uncontrolled discretion of the magistrate. It also failed to review the magistrate's discretion, regardless of the standard that may have been implicit in his determination since no explicit statement of the standards of weight and credibility was enunciated. There is, moreover, no federal standard to guide the courts on this issue and, therefore, no opportunity for individuals such as petitioner to test on appeal whether a magistrate has properly applied or abused his discretion in failing to consider the weight and credibility of extradition documents and evidence supporting the requirement of probable cause under Section 3184.

Had the magistrate weighed the trustworthiness of the evidence the most likley finding would have been that the twice-removed hearsay testimony described above cannot reasonably support proof of probable cause. The only corroborating evidence against the petitioner is that of tortured "confessions." The Fifth Circuit did not, however, reach the issue of torture as it did not rely on it in its review of the magistrate's decision. Thus, the double hearsay evidence stands wholly unsubstantiated as proof of probable cause. In these circumstances, it cannot be said that probable cause as required by Section 3184 and as applied in accordance with U.S. law was established. If there is any standard of competency, it has not been expressly defined in any decision of this Court.

2. *The federal probable cause standard fails to resolve the conflict among the jurisdictions concerning whether the weight and credibility of evidence is a mandatory or discretionary matter.* The Fifth Circuit's finding that probable cause existed largely on the basis of twice-removed hearsay testimony simply underscores the more pervasive problem of whether the inquiry into probable cause envisions mandatory or discretionary consideration by the extradition magistrate of the weight and credibility of the evidence presented by the Government on behalf of a requesting state. No pronouncement on probable cause has been made by this Court since *Fernandez v. Phillips,* 268 U.S. 311 (1925), and as a consequence conflicting standards have developed in the federal courts. These standards are also in conflict with the federal probable cause standard as stated in Federal Rules of Criminal Procedure, rule 4(a), (b) which are applicable to extradition hearings, save for this Court's finding to the contrary.

Petitioner does not contend that he is entitled to introduce exculpatory evidence, as this is contrary to *Charlton v. Kelly* 229 U.S. 447 (1913) and *Glucksman v. Henkel* 221 U.S. 508 (1911), but under *Collins v. Loisel*, supra, he is entitled to introduce evidence to rebut or nullify probable cause. Such evidence in this case goes directly to the issue of weight and credibility of the government's evidence. Thus, the thrust of petitioners claims are that the magistrate's failure to consider weight and credibility of the challenged and questionable evidence, the reviewing court's failure to inquire into the issue of abuse of discretion for failure to do so, and, in addition, the absence of clear federal guidelines on the subject, as is evidenced by the conflicting opinions of the circuits and districts discussed below, constituted error.

Probable cause in extradition matters, as codified under 18 U.S.C. §3184, was defined in *Fernandez*, supra, as requiring that competent legal evidence be presented so as to reasonably warrant the conclusion that the relator (here petitioner) committed the offense for which he is sought and not simply that he is accused or suspected of doing so. See also *Collins v. Loisel*, supra *Bingham v. Bradley*, 241 U.S. 511, 517 (1916); *McNamara v. Henkel*, 226 U.S. 520, 524 (1913). Uncertainty and conflict exist, however, among the circuits and districts concerning precise guidelines to decision. For example, in *Greci v. Briknes*, 527 F.2d 956 (1st Cir. 1976) and in *Sindona v. Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978), 619 F.2d. 167 (1980) the courts stated that the probable cause standard must be satisfied in accordance with the law of the requested state; that is, it must meet the federal standard as defined by U.S. legislation and interpreted by the United States Supreme Court. Some federal courts, however, have construed this standard

as requiring that the evidence be sufficient to show reasonable grounds to believe the accused guilty. *Escobedo v. United States*, 623 F.2d 1098; *Gusikoff v. United States*, 620 F.2d 459 (5th Cir. 1980); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971); *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969). In those cases the weight and credibility of the evidence was apparently to be considered as a matter wholly within the court's discretion. Other courts, however, have required that the evidence be "competent", *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978), or even that the evidence be both competent and sufficient, *Shapiro v. Ferrandina*, 355 F. Supp. 563 (S.D.N.Y. 1973). Finally, some courts have interpreted probable cause in a manner suggesting that the requesting state make a *prima facie* showing, thereby imposing a significantly higher standard under which it is mandatory that the weight and credibility of the evidence be considered. *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976); *Matter of Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973). However, neither *Jhirad* nor *Shapiro* regarded the extradition hearing as akin to a trial so that the right of the accused to confront the witnesses against him concededly does not apply. See *Bingham v. Bradley*, supra at 517. Nor did those courts view the *habeas corpus* proceeding as a full appeal. Petitioner does not contend that it is, but that it is within the scope of *habeas corpus* to review the lack of probable cause standards applied, and the resulting abuse of discretion of the extradition magistrate (*inter alia*) in applying these standards.

Notwithstanding the higher standard of *Jhirad* supra and *Shapiro* supra, the underlying policy that extradition treaties are to be liberally construed so as to give effect to the intention of the contracting parties

was not vitiated. See *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933); *Bingham v. Bradley*, supra. It is equally clear that the showing of proof amounting to a *prima facie* case does not entail the additional requirement of making other forms of evidence admissible. Thus, evidence of alibi or of defense such as insanity or of newly discovered exonerating evidence continue to remain discretionary. See e.g., *Charlton v. Kelly*, supra; *Hooker v. Klein*, supra; *Peroff v. Hylton*, 563 F.2d 1099 (4th Cir. 1977). Similarly, the right of courts to bar evidence which merely contradicts probable cause or which presents a different version of events will not be affected. See *Hooker v. Klein*, supra; *Shapiro v. Ferrandina, supra; Freeman v. United States*, supra; *Matter of Shapiro*, supra. Finally, the requirement that explanatory evidence tending to rebut or obliterate probable cause be admissible remains valid. See *Collins v. Loisel*, supra; *Sayne v. Shipley*, supra; *Freedman v. United States*, supra. Cf. *Sabatier v. Dambrowski*, 453 F. Supp. 1250 (D.R.I. 1978)

The great disparity among the circuits and districts concerning the proper interpretation and application of probable cause in extradition cases means that contradictory and inequitable results obtain in substantially similar circumstances since persons accused in some jurisdictions will be afforded the opportunity to challenge the weight and credibility of the evidence, while persons in other jurisdictions will not. The variance in procedural rights in concert with the attenuation of substantive rights is so significant as to constitute denial of due process and equal protection under the Fifth Amendment and makes imperative a conclusive pronouncement by this Court.

Compelling reasons exist for requiring a uniform standard, at least where the evidence is facially defective, as in the instant petition. The extradition court should consider the weight and credibility of the evidence presented by the government and the failure to do so constitutes a reviewable question, which, when found to be an abuse of discretion, is reversible error. A uniform test would preserve the integrity of the U.S. judicial process against abuses by the government and by requesting nations seeking to use the U.S. judiciary for their purposes, and would secure the applications of Fifth Amendment due process and equal protection standards to all individuals by establishing a procedure reasonably calculated to produce a fair, evenhanded and proper result. It is essential in the circumstances described herein to effectively define and delineate the parameters of discretion available to magistrates and to prescribe appropriate guidelines for reviewing courts.

3. *Evidence secured by torture should, as a matter of law, be inadmissible to determine probable cause.*

Once it is determined that the evidence, as discussed above, fails to establish probable cause, the focus of the instant petition necessarily shifts to consideration of the allegedly incriminating confessions by Escobedo and Hernandez, which the Mexican government secured by means of torture. The sworn testimony relating to the fact of torture was, and remains, uncontroverted. To find such evidence admissible in the U.S. courts is to condone disregard for the most basic standards of due process and to permit a foreign sovereign to demean and mock the integrity of the judicial process of the United States. In any event, in accordance with a principle which this Court has upheld since 1897 in *Bram v.*

United States 168 U.S. 532, the incompetency of a confession because it is coerced is a question controlled by the Fifth Amendment self-incrimination clause and the Court in the present petition should not disregard the question. The Court of Appeals did not address this issue as part of the probable cause question (623 F.2d at 1103-1104), but summarily dealt with it in a footnote (623 F.2d at 1102, n. 13).

Petitioner notes initially that the present contention is outside the traditional rule of noninquiry. That rule bars the courts of the requested state from extending constitutional protections extraterritorially to individuals before the court for acts committed by agents of a foreign government. *Neeley v. Henkel*, 180 U.S. 109 (1901); *Rosado v. Civiletti*, 621 F.2d (2d Cir., 1980) (amply describing what appears to be the shocking common practice of torture by Mexican police of persons under interrogation and general conditions in Mexican prisons); *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975). Constitutional rights extend extraterritorially, however, to protect United States citizens against the illegal conduct of U.S. agents abroad. *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). See also *United States ex rel Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974).

Petitioner does not challenge the jurisdiction of the court and recognizes that except in particularly shocking circumstances, *United States v. Toscanino*, supra, it is no defense under existing case law to a state or federal criminal charge that a defendant was illegally arrrested or forcibly brought within the court's

jurisdiction. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). The conduct of foreign officials becomes an issue, however, where as a result of that conduct there are substantive grounds, as here, upon which a U.S. court is asked to rely and where the judicial processes of the United States are invoked on the basis of conduct patently offensive and violative of minimum standards of criminal justice. For U.S. Courts to perfunctorily acquiesce to a foreign nation's accusations against a U.S. citizen generates judicial impotence among American courts and is tantamount to approving practices which American jurisprudence finds repugnant. Petitioner maintains that as a matter of sound judicial policy, United States courts should refuse to give legal effect in the United States to acts of torture by foreign officials and should accordingly hold that, as a matter of law, evidence secured by means of torture is inadmissible in U.S. extradition proceedings.

That conclusion is compelled by the mandates of the Fifth Amendment due process and privilege against self-incrimination clauses and is additionally founded on the requirements of United States rules of criminal procedure. The long history of this Court's opinions against the inadmissibility of confessions involuntarily extracted by means of torture or other forms of coercion need not be elaborated upon. See, e.g., *Malloy v. Hogan* 378 U.S. 184 (1964); *Rogers v. Richmand* 365 U.S. 534 (1961); *Blackburn v. Alabama* 361 U.S 199 (1960); *Spano v. New York* 360 U.S. 315 (1959); *Turner v. Pennsylvania* 338 U.S. 62 (1949); *Harris v. South Carolina* 338 U.S. 68 (1949); *Watts v. Indiana* 338 U.S. 49 (1949); *Ashcraft v. Tennessee* 322 U.S. 143 (1944); *Brown v. Mississippi* 297 U.S. 278 (1936). The principal issues are, therefore, whether a tortured confession, evident on the face of

the record, is admissible in U.S. courts; whether the courts will not at the very least regard its weight and credibility as suspect; and whether as a matter of judicial policy it should not be excluded. The integrity of the judicial process and that of the judicial system of the United States preclude reliance on any evidence which is obtained by conduct so contrary to the Constitution that it "offends those canons of decency and fairness which express the notions of justice of English-speaking peoples." *Rochin v. California*, 342 U.S. 165, 172 (1952). Torture is so inherently abhorent to the standards of civilized justice of the United States and so contrary to its public policy that United States judicial action cannot be predicated upon actions so flagrantly abusive of an individual's constitutional and statutory rights.

In essence petitioner maintains that although some of the information presented in the Mexican governments documents may appear to be damaging to petitioner, he should be afforded the opportunity to attack their admissability and reliability. Although it is not the position of U.S. courts to rule on the merits of foreign legal processes, the uses which are made of those processes in the United States are within the power of U.S. courts to consider. It will be noted, in this regard, that long-standing U.S. legislative policy was clearly enunciated in the first Judiciary Act of 1789 in the form of the Alien Tort claims Act 1 Stat. 73, 77 (1789), current version at 28 U.S.C. §1350 (1976), whereby an alien can file suit against a foreign government for torture. *Filartiga v. Pena-Irola*, __ F.2d __ (2d. Cir. 1980). Cf. *Waits v. McGowan*, 516 F.2d 203 (3rd Cir. 1975) (holding that while petitioner failed to state a claim under 42 U.S.C. §§1983 and 1985, a right of action nevertheless existed even in extradition proceedings). It is also noteworthy that the U.S. is bound under

international law to the prohibition of torture and thus its consequences. See the Universal Declaration on Human Rights Article V, 10 December 1948, G.A. Res. 217 A (III); the International Covenant on Civil and Political Rights Article VII, 16 December 1966, G.A. Res. 2200 A, 21 U.N. GAOR Supp. (No. 16) 49; the Inter-American Convention on Human Rights, 22 November 1969, O.A.S. Off. Rec. Ser. K/XVI/1.1, Doc. 65, Rev. 1, Cor 1 (Jan. 7, 1970). See also, the Draft Convention on the Prevention and Suppression of Torture E/CN.4/NGO/213 1 February 1978 (presently before the U.N. Commission on Human Rights and soon to be completed declaring torture an "international crime" (Article I). See also Bassiouni, "An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture" 48 *Revue Internationale de Droit Penal* 1978, No. 3-4).

4. *The context of the political offense exception to extradition which encompasses a revolution or armed rebellion should also extend to ongoing resistance movements.*

The doctrine of the political offense exception applicable in the instant petition is defined in general terms by the political incidence test, which was adopted from the British case of *In re Castioni* [1891] 1 Q.B. 149. The political incidence test contemplates a two-fold standard in order that a common crime linked to a political objective be considered as a political offense: (1) there must be a revolt or some other violent political disturbance or upheaval; and (2) the act for which extradition is sought must be incidental thereto or form a part thereof. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894). It is implicit in this test that the individual be

politically motivated. See generally M.C. Bassiouni, *International Extradition and World Public Order* (1974) 370-428.

A conflict exists among the circuits and districts, however, with respect to the second component of the test. Some courts have required a very strong relationship between the act and the political objective sought thereby. *Ornelas v. Ruiz*, 161 U.S. 502 (1846); *Escobedo v. United States*, supra; *Gallina v. Fraser*, 177 F. Supp. 356 (D. Conn. 1959); *Jimenez v. Aristequieta*, 311 F.2d 547 (5th Cir. 1962); *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); *Matter of Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978); *Matter of Ziyad* (unreported, N.D. Ill. 1979, now pending before the Seventh Circuit); *Matter of McMullen* (unreported, N.D. Cal. 1979); whereas other courts have required a very attenuated connection between act and objective. *In re Ezeta*, supra; *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1954); *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *surrender denied on remand sub nom. United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); *In re Mylonas*, 187 F. Supp. 716 (N.D. Ala. 1960). Additonally, decisions which require the existence of a strong connection or link also demand that the act be directed against the estate or its supporting structures, while decisions which require a minimal showing of incidence do not impose that other requirement. In short, the U.S. decisions follow two distinct and irreconcilable directions depending upon the court's perception that the accused demonstrated a strong or a weak linkage among his conduct, his ideological objective and the political context in which it occurred.

It is also significant that in adopting the *Castioni* standard United States courts have consistently failed

to consider *In re Meunier* [1894] 2 Q.B. 415, which modified the *Castioni* test and in which the political incidence test was held to require that there be two or more parties in the state, each seeking to impose its own form of government. See also *In re Aston* [1896] 1 Q.B. 108. Nothing of course requires U.S. Courts to follow English decisions, but where the adoption of a given test is made and followed on the assumption that it has not been altered, it is relevant to raise the issue of its continued validity. In fact if the *Meunier* and *Aston* standards amending *Castioni* were followed, the political offense exception would apply to the acts attributed to petitioner since those acts were directed against the state or its agents or officials. Adaptation of the *Meunier* principle to *Castioni* would additionally avoid future anomalous results, as occurred, for example, in the *Artukovic* cases, supra, and *In re Mylonas*, supra.

The disarray apparent in political offense exception cases leads to inconsistent application of the political incidence test, making the continued utility of that test uncertain and of questionable validity. The test is, moreover, by virtue of its all too flexible application, subject to political considerations, as is evident from the government's position on this issue. Furthermore, this court should reconsider the political offense exception in light of contemporary political and international developments such as the protean concept of civil strife and expanding protection of humanitarian interests and rights. See generally the *Four Geneva Conventions of 12 August 1949*, T.I.A.S. Nos. 3362-3363-3364-3365 (1956); as amended in *Protocols Additional to the Geneva Conventions of 12 August 1949*, 10 June 1977, *reprinted in Int'l Rev. Red Cross* (Special Issue, August-September, 1977) (particularly on the issue of what constitutes a conflict of a non-international character in Protocol I,

Articles 43 and 44). See also Mallison and Mallison, "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict," 9 *Case West. Res. J. Int'l L.* 39 (1977). The Court also should consider the need to redefine the concept of political offenses in the context of rising international terrorism. See Bassiouni, "Prolegomenon to Terror Violence," 12 *Creighton L. Rev.* 745 (1979); M. C. Bassiouni (ed.), *International Terrorism and Political Crimes* (1975); R. Freidlander (ed.), *Terrorism* (2 Vols., 1979-80).

For the reasons stated above, petitioner urges the Court to reconsider the political offense exception and to articulate the standard in a manner that takes into account the necessities of modern civil and political unrest, for which position held in the late 1800's are no longer viable. See M. C. Bassiouni, *International Extradition and World Public Order* 411-425 (1974). The strict, seemingly literal demand under the antiquated test for a full scale revolution, with the masses storming the state capital, is no longer a realistic criteria to come under the political offense exception. The operative facts of the instant petition afford the Court that opportunity. There is, first of all, an ongoing conflict between former Cuban nationals, many of whom including petitioner, are naturalized U.S. citizens, and the Marxist regime of Fidel Castro. That conflict took the form of an armed rebellion in 1961 officially supported by the U.S. government,(see generally P. Weyden *Bay of Pigs* (1979)),and has erupted sporadically ever since in various forms and is evidenced by the facts giving rise to the present case. The continuity of the conflict is further demonstrated by the recent massive influx of Cuban refugees who have been given political asylum in the United States in recognition of the political unrest, discontent and struggle in Cuba.

A multi-dimensional question of significant national importance is therefore presented: the meaning of civil strife in its contemporary context; the erroneous interpretation of English law described herein; and the conflicting decisions of the circuits and districts owing to the absence of legislative guidelines and this Court's lack of contemporary pronouncements on the subject.

5. *Plain error was committed by reason of the court's failure to consider the humanitarian issues concerning the likelihood that petitioner will suffer political persecution and physical abuse if he is extradited.* The Fifth Circuit's perfunctory rejection of petitioner's claim that extradition be barred for humanitarian reasons was based solely on the finding that such questions are exclusively executive matters. 623 F.2d at 1107. That holding is directly contrary to U.S. international legal obligations, U.S. legislation and the position of other circuits that this country has an interest, through its courts, in the treatment of its citizens abroad. *Rosado v. Civiletti*, supra; *Peroff v. Hylton*, 542 F.2d 1247 (4th Cir. 1976), *cert. denied* 429 U.S. 1062 (1977); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925 (2d Cir. 1974); *Gallina v. Fraser*, 278 F.2d 22 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960). See also *Neeley v. Henkel*, supra; *Wilson v. Girard*, 254 U.S. 524 (1956) (where in both cases minimum standards of fairness were provided in the foreign tribunal); *United States v. Salzmann*, 548 F.2d 395.

In the instant petition, the court substantially prejudiced petitioner by failing to inquire into the treatment that awaits him in Mexico. In so doing it failed to consider that Mexican prison guards and police routinely engage in physical abuse of persons detained and imprisoned. Prisoners are also subject to brutal

gangs of prisoners who extort great sums of money from U.S. convicts in return for the necessities of life and inflict brutal beatings on the unfortunate individual who is unable or unwilling to pay ransom. See *Rosado v. Civiletti*, supra; *Velez v. Nelson*, 475 F. Supp. 865 (D. Conn. 1979). It was because of these conditions that the U.S. entered into a treaty with Mexico on the Transfer of Prisoners, 28 U.S.T. 7399, T.I.A.S. No. 8718, and implementing legislation 18 U.S.C. §4108 (Supp. I, 1977). See Hearings Before the Committee on Foreign Relations, United States Senate, 1st Sess. 95th Cong., June 15-16, 1977); Hearings Before the Sub-Committee on Penitentiaries and Corrections of the Committee on the Judiciary, United States Senate, 1st Sess. 95th Cong., July 13-14, 1977; Hearings on International Law of the Committee on the Judiciary, House of Representatives, 1st Sess. 95th Cong., September 16, October 6, 1977. See also Bassiouni, "Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada" 11 *Vand. J. Trans. L.* 249 (1978); Abramovsky and Eagle, "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty" 64 *Iowa L. Rev.* 274 (1979) and Vagts, "A Reply to a Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty" 64 *Iowa L. Rev.* 325 (1979); Abramovsky, "A Critical Evaluation of the American Transfer of Penal Sanctions Policy" 25 *Wisc. L. Rev.* 25 (1980).

If petitioner should happen to avoid such treatment in Mexico, there is no obstacle imposed by the United States-Mexico Extradition Treaty, supra, to his subsequent extradition to Cuba where he would at least be subjected to political persecution. The likelihood of such occurrence is high in view of the fact that Mexico and Cuba maintain amicable diplomatic relations.

Moreover, the totalitarian nature of the Cuban regime necessitates the Court's consideration of whether the political offense exception should be applied with greater liberality where a prospective requesting state uses another foreign state as its agent to achieve otherwise impermissible ends, particularly where the subject-individual opposes that regime in the cause of freedom. See *Ex parte Kolcyznski* [1955] 1 All Eng. Rep. 31.

Finally, the United States is obligated under international law not to return a person to a state where he could be the subject of discrimination or persecution. Petitioner's likely treatment by Mexican authorities and in the prisons, which approach medieval conceptions of justice, and his possible return to Cuba are clearly valid considerations which the Courts below failed to consider. In addition to the obligations of the Universal Declaration on Human Rights, *supra*, the International Covenant on Civil and Political Rights, supra, and the Inter-American Convention on Human Rights, supra, the United States has ratified the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968) (which Protocol incorporates by reference provisions of the 1951 Refugee Convention) wherein Article 33 specifically prohibits the expulsion or return of a refugee whose life or freedom would be threatened *inter alia* " on account of his . . . political opinion." See also *Sindona v. Grant*, supra at 174. the U.S. further enacted in 1980 the Refugee Act Pub. L. 96-212, Title II §201(a), 94 Stat. 102, amending 8 U.S.C. Chapter 12 to support its treaty obligations. Thus international obligations exist which preclude the return of a person who could be the subject of treatment deemed non-humanitarian, and that is also implicit in the treaty of extradition in question.

The Fifth Circuit's failure to make judicial inquiry into these questions and in not applying the law concerning the potential inhumane treatment of petitioner requires that the case be remanded for reconsideration of the factual basis of this contention.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JEFFREY S. WEINER, Esq.
and
M. CHERIFF BASSIOUNI, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this _____ day of December, 1980, forwarded to MURRAY R. STEIN, ESQUIRE, Department of Justice, Washington, D.C. 20520.

Respectfully submitted,

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JEFFREY S. WEINER

Appendix

Gaspar Eugenio Jimenez ESCOBEDO,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

Gustavo CASTILLO,
Petitioner-Appellant,

v.

Donald D. FORSHT, U. S. Marshal,
Respondent-Appellee.

Nos. 79—1480, 79—1490.

United States Court of Appeals,
Fifth Circuit.

Aug. 14, 1980.

United States citizens appealed from orders of the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denying their requests for habeas corpus relief by which they sought to block their extradition to Mexico for prosecution on charges of murder, attempted murder, and attempted kidnapping. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) evidence established probable

cause to believe that the United States citizens committed the crimes charged; (2) although Mexican extradition documents establishing probable cause may not have constituted depositions in the strictly legal sense, they were sufficient to satisfy provision of United States — Mexico Extradition Treaty requiring depositions to accompany warrants for arrest; (3) United States citizens were not entitled to haven under provision of the Treaty barring extradition for crimes of a purely political character; (4) discretion given executive to extradite United States nationals did not violate due process; and (5) question whether United States should refuse to extradite its citizens because of Mexico's failure to extradite its nationals was one for the Executive Branch, not the courts, to decide.

Affirmed.

Appeals from the United States District Court for the Southern District of Florida.

Before, MORGAN, ANDERSON and RANDALL, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

This is an appeal from orders denying requests for *habeas corpus* relief in international extradition proceedings. On December 8, 1977, the Government of Mexico, pursuant to the United States-Mexico

Extradition Treaty of 1899[1], requested extradition of two United States citizens, Gaspar Eugenio Jimenez Escobedo and Gustavo Castillo (petitioners), for prosecution on charges of murder, attempted murder, and attempted kidnapping. In response to this request, petitioners were arrested in the Southern District of Florida. After holding an evidentiary hearing under 18

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[1]Treaty of Extradition Between the United States of America and the United Mexican States, Feb. 22, 1899, 31 Stat. 1818, T.S. 242 [referred to herein as Extradition Treaty].A new extradition treaty which entered into force on January 25, 1980, has superceded the 1899 Treaty. 17 *Int'l. Legal Materials* 1068 (1978). However, Art. 22(2) of the 1980 Treaty provides that, "Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 Feb. 1899 [as supplemented]." Therefore, this extradition request, which has been in process since 1977, is governed by the 1899 Treaty.

U.S.C. §3184[2], a United States Magistrate, on May 31, 1978, issued a Certificate of Extraditability and Order of Commitment for both petitioners. The magistrate found, *inter alia*, that petitioners are the individuals sought by Mexico, that the crimes for which petitioners are sought are extraditable offenses under the Treaty, and that there is probable cause to believe that petitioners committed those crimes in Mexico.

On June 2 and June 21, 1978, Escobedo and Castillo, respectively, filed the instant petitions for writs

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[2]18 U.S.C. §3184 provides:

§3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

of *habeas corpus*, seeking to block their extradition. By orders entered December 26, 1978, the Southern District of Florida denied the petitions. This appeal followed. Petitioners urge that the district court erred in not granting the writ because: (1) the evidence offered at the extradition hearing did not establish probable cause to believe that they committed the crimes charged; (2) the offenses charged by Mexico are political in character; (3) petitioners, as United States nationals, are not subject to extradition; and (4) certain humanitarian considerations bar extradition.[3]

SCOPE OF REVIEW

[1] The scope of *habeas corpus* review of a magistrate's extradition order is quite narrow. Such review is limited to determining "whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970 (1925); *Gusikoff v. United States*, 620 F.2d. 459, 461 (5th Cir. 1980); *Brauch v. Raiche*, 618 F.2d. 843, 847 (1st Cir. 1980); *Garcia-Guillern v. United States*, 450 F.2d. 1189, 1191 (5th Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d. 455 (1972). The writ is not a means for

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[3]Using at times somewhat different arguments, both petitioners, in separate briefs, urge the first three grounds as bars to extradition. Only Escobedo raises the fourth ground. In reviewing each argument raised in support of the first three grounds, we shall not always specify which petitioner is the author of the argument.

rehearing the magistrate's findings. *Fernandez v. Phillips*, 268 U.S. at 312, 45 S.Ct. at 542; *Garcia-Guillern v. United States*, 450 F.2d. at 1191-92.

PROBABLE CAUSE

As stated, petitioners are charged by the Mexican government with murder, attempted murder and attempted kidnapping. These charges arise out of an alleged attempt by petitioners, along with Orestes Ruiz Hernandez[4] to kidnap the Cuban Consul in Merida, Mexico, Daniel Ferrer Fernandez, on July 23, 1976. During the attempt, an associate of the Consul, Artagnan Diaz y Diaz, was shot and killed. Although bullets were allegedly fired at the Consul, he escaped without injury. Escobedo was arrested at the Mexico City airport the day after the incident. He subsequently escaped from a Mexican jail and fled to the United States. Castillo was never apprehended by Mexican authorities.

[2] In reviewing the existence of probable cause to sustain the charges against petitioners "or, in other words, the existence of a reasonable ground to believe the accused guilty," our function "is to determine whether there is any competent evidence tending to show probable cause. The weight and sufficiency of that evidence is for the determination of the committing court." *Garcia-Guillern v. United States*, 450 F.2d. at

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[4]Hernandez, presently incarcerated in Mexico, is not a party to this proceeding.

1192; *Gusikoff v. United States, supra*, 620 F.2d. at 462.[5] In this case, the evidence introduced at the extradition hearing to prove probable cause consisted of various documents submitted by Mexico in support of its extradition request.[6]

[3-5] With respect to Escobedo, the documents show that explosives and firearms were found in his luggage at the time of his arrest.[7] A ballistics report contained in the Extradition Documents concludes that the bullet that killed Diaz y Diaz was fired from one of these firearms.[8] With respect to Castillo, the documents

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[5]As we said in *Gusikoff*:

> Hearings held pursuant to Section 3184 are in the nature of a preliminary hearing (Citation omitted.) The foreign country does not have to show actual guilt, only probable cause that the fugitive is guilty. (Citations omitted.) The magistrate does not inquire into the guilt or innocence of the accused; he looks only to see if there is evidence sufficient to show reasonable ground to believe the accused guilty. (Citation omitted.) The magistrate also determines whether the offense charged is extraditable and whether the person brought before him is the one accused of crime.

620 F.2d. at 462, *quoting from Sayne v. Shipley*, 418 F.2d. 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903, 90 S.Ct. 1688, 26 L.Ed.2d. 61 (1970).

[6]An English translation of these documents was also introduced.

[7]English Translation of Mexican Extradition Documents [hereinafter referred to as Extradition Documents or Documents] at 35-36; 55-60.

[8]*Id.* at 71-73.

contain a third party's report of a deposition given by the Cuban Consul, Fernandez, to a Mexican official on July 24, 1976.[9] The report states that during the deposition, the Consul was shown a picture of Castillo, and that he "recognized him as one of the persons who performed the attack."[10] At this deposition, and in a statement given to authorities on the day of the attack[11], the Consul is also reported as saying that one of the attackers approached him with a gun, that he thought bullets were fired at him during the incident, and that the attackers attempted to kidnap him. Furthermore, the documents indicate that Castillo's passport was found in Escobedo's luggage at the time of Escobedo's arrest.[12] We hold that this evidence establishes probable

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[9]*Id.* at 28-30.

[10]Castillo contends that this report cannot be used to establish probable cause because it constitutes compound hearsay and is untrustworthy. Hearsay, however, is permitted in extradition proceedings. *See, e.g., Bingham v. Bradley,* 241 U.S. 511, 517, 36 S.Ct. 634, 637, 60 L.Ed. 1136 (1916); *Shapiro v. Ferrandina,* 478 F.2d 894, 902 (2d Cir.), *cert. dismissed,* 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973); *Sayne v. Shipley,* 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied,* 398 U.S. 903, 90 S.Ct. 1688, 26 L.Ed.2d 61 (1970). Further, the credibility of the reported identification is a matter committed to the magistrate and is not reviewable on *habeas corpus. See Garcia-Guillern v. United States,* 450 F.2d at 191-92; *Merino v. United States Marshal,* 326 F.2d 5, 12 (9th Cir. 1963), *cert, denied,* 377 U.S. 997, 84 S.Ct. 1922, 12 L.Ed.2d 1046 (1964).

[11]Extradition Documents at 9.

[12]*Id.* at 56.

cause to believe that both petitioners committed the crimes charged.[13]

[6, 7] Petitioners contend, however, that the Mexican Extradition Documents should not have been admitted at their extradition hearing; they argue that these documents would have been inadmissible for the purpose of proving probable cause in a Florida court. This argument is without merit. State law does not control the reception of evidence at extradition hearings. *Collins v. Loisel,* 259 U.S. 309, 317, 42 S.Ct. 469, 472, 66 L.Ed. 956 (1922); *Shapiro v. Ferrandina,* 478 F.2d at 901-02; *Sayne v. Shipley,* 418 F.2d at 685. The admissibility of the Mexican Extradition Documents is governed by 18 U.S.C. §3190, which provides:

> **§3190. Evidence on hearing**
>
> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from

[13]The Extradition Documents include confessions made to Mexican authorities by Escobedo and Orestes Ruiz Hernandez. Petitioners contend that these confessions cannot be used for the purpose of establishing probable cause because they were obtained by means of torture. We do not reach this contention because we conclude that the evidence independent of the confessions, discussed above, establishes probable cause. *Cf. Magisano v. Locke,* 545 F.2d 1228, 1230 (9th Cir. 1976) (evidence not obtained from allegedly illegal wiretap sufficient to show probable cause for extradition).

> which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Since the Mexican Extradition Documents were properly certified by the United States Ambassador to Mexico, they were authenticated, and admissible under section 3190. *See, e.g., Shapiro v. Ferrandina,* 478 F.2d at 901-02; *Jimenez v. Aristeguieta,* 311 F.2d 547, 562 (5th Cir. 1962), *cert. denied,* 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963).

[8] Petitioners next contend that the English translation of the Mexican Extradition Documents contains various inaccuracies and therefore should not be relied upon in assessing probable cause. We reject this argument. After receiving the testimony of an interpreter who appeared on petitioners' behalf, Supp. Record 129-139, the magistrate found that petitioners had failed to impeach the accuracy of the translation. We agree with this finding. In any event, even if petitioners' interpretation of the Documents were accepted, the Documents still support the presence of probable cause.

[9] Finally, petitioners argue that the evidence used to establish probable cause did not satisfy Article VIII of the Extradition Treaty. Article VIII states:

> When . . . the fugitives shall have been merely charged with a crime or offense, [an] . . . authenticated and attested copy of the warrant

> for his arrest in the country where the crime or offense is charged to have been committed, and of the *depositions upon which such warrant may have been issued*, must accompany the requisition as aforesaid.

(Emphasis added). Petitioners contend that Article VIII was breached because none of the documents submitted by Mexico constitute "depositions" in the strictly legal sense, namely:

> The testimony of a witness taken upon interrogatories, not in open court, but in pursuance of a commission to take testimony issued by a court, or under a general law on the subject, and reduced to writing and duly authenticated, and intended to be used upon the trial of an action in court.

Black's Law Dictionary (4th ed. 1968). This argument is unpersuasive. The purpose of Article VIII is to provide the asylum country both with proof of the charges brought by the requesting country and with the evidence supporting those charges. The extradition papers forwarded by Mexico fulfill this dual purpose. They include copies of the warrants for petitioners' arrests as well as documents establishing probable cause to believe that the crimes charged were committed.[14] While these documents may not constitute depositions

[14]Several of these documents are reports of depositions made by others.

in the strictly legal sense[15], we hold that they do satisfy Article VIII. To bar extradition, despite the existence of properly authenticated documents establishing probable cause, because of a narrow and technical definition of the term "deposition" would defeat the intent of the Treaty parties. "It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10, 57 S.Ct. 100, 81 L.Ed. 5 (1936).[16]

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[15]We note that the term "deposition," in the generic sense, means simply "an affidavit, an oath, a statement under oath," Ballentine Law Dictionary, (3d ed. 1969); *accord*, 26A C.J.S. Depositions §1 at 287 (1956).

[16]The comments of J. G. Hawley are appropriate:

> While in extradition cases the substance of the matter ought to be carefully examined before a man is taken away from the jurisdiction whose protection he is entitled to invoke, there are many reasons why strict technical accuracy is not to be required. The papers are prepared by persons who are educated under foreign codes of law and accustomed to different methods of procedure from those in use in the United States. If a merely technical objection is unnecessarily sustained, it must usually result in a considerable delay if not in a failure of the purposes of extradition altogether. Therefore, in these cases, American magistrates, while for the most part careful not to allow extradition in cases where they were not sufficiently satisfied as to the merits, have been solicitous to prevent a failure of justice by giving effect to merely technical objections.

J. G. Hawley, *Law and Practice of International Extradition*, 41-42 (1893).

POLITICAL OFFENSE EXCEPTION

Article III of the Extradition Treaty bars extradition, "When the crime or offense charged shall be of a purely political character." Petitioners argue that Mexico's charges, on their face, bring this case within Article III. Mexico charges that petitioners attempted to kidnap the Cuban Consul for the purpose of ransoming him for political prisoners being held in Cuba. These charges trigger the political offense exception because, say petitioners, a political offense includes "a common crime . . . committed by an ideologically motivated offender . . . where the common crime is intricately linked to the ideology, motive and intent of the alleged offender."[17] We disagree.

[10, 11] This circuit defines a political offense under extradition treaties as an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion. *Garcia-Guillern v. United States*, 450 F.2d. at 1192; *Jimenez v. Aristeguieta*, 311 F.2d. at 560.[18] An offense is not of a political character simply because it was politically motivated. In this case, petitioners do not contend, and the evidence offered at the extradition

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[17]Brief for Petitioner Castillo at 35. Escobedo also argues that the alleged offenses were motivated by ideology rather than ill will toward the victims or a desire for monetary gain. Brief for Petitioner Escobedo at 20-21.

[18]This definition is derived from the English case of *In Re Castioni*, [1891] 1 Q.B. 149 and is followed by other American courts, *see, e.g., Sindona v. Grant*, 619 F.2d. 167 at 173 (2d Cir. 1980); *In re Ezeta*, 62 F. 972, 977-1002 (N.D. Cal.1894). *See generally* I. A. Shearer, *Extradition in International Law* (1971).

hearing does not show, that the charges arising out of the alleged attempted kidnapping were committed in the course of and incidental to a violent political disturbance. Therefore, petitioners are not entitled to haven under Article III of the Treaty.

NATIONALITY

Article IV of the Extradition Treaty, on its face, invests the Executive Branch of each treaty party with discretion to surrender its own nationals. It states:

> Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

Despite this language, petitioners contend that as United States citizens, they are not subject to extradition to Mexico. Their argument is three-fold.

First, petitioners argue that the discretion given the Executive under Article IV violates due process because no standards are provided to guide the exercise of this discretion. We reject this argument. Contrary to petitioners' suggestion, a United States citizen may not be whisked away to a foreign country for trial by

Executive whim. Under 18 U.S.C. §3186[19], the Secretary of State may not surrender any person to a foreign government unless the person has been found extraditable by a magistrate at a hearing held under 18 U.S.C. §3184. Executive discretion arises only if the magistrate determines that there is "evidence sufficient to sustain the charge under the provisions of the proper treaty." *Id.* These statutory provisions safeguard the fugitive's due process rights. *See Peroff v. Hylton*, 563 F.2d. 1099, 1102-03 (4th Cir. 1977); *Sayne v. Shipley*, 418 F.2d. at 686.

[12, 13] Assuming that the magistrate's decision is in favor of extradition, the Executive's discretionary determination to extradite the fugitive[20] — even one

[19]Section 3186 provides:

> **§3186. Secretary of State to surrender fugitive**
>
> The Secretary of State may order the person committed under sections 3184 or 3185 of this title [18 USCS §3184 or 3185] to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.
>
> Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.
>
> A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

[20]The Secretary of State always has discretion to refuse to extradite, even if the magistrate under 18 U.S.C. §3184 concludes that the fugitive is extraditable. *See* 18 U.S.C. §3186 (the Secretary of State *"may"* extradite the person committed under section 3184); *Sindona v. Grant, supra*, 619 F.2d at 176; *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir. 1965); M.M. Whiteman, 6 Digest of International Law 1046 (1968) [hereinafter referred to as Whiteman].

who is a United States national — is not generally subject to judicial review.[21] The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs. *Sindona v. Grant, supra; Peroff v. Hylton,* 563 F.2d at 1102-03; *Shapiro v. Secretary of State,* 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd. sub nom. Commissioner of Internal Revenue Service v. Shapiro,* 424 U.S. 614, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976); *Wacker v. Bisson,* 348 F.2d 602, 606 (5th Cir. 1965) ("Review by *habeas corpus* . . . tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the Executive Branch to decide."); M.C. Bassiouni, *International Extradition and World Public Order,* 29-34 (1974). This principle was applied in *Peroff v. Hylton, supra,* a case involving the United States-Sweden Extradition Treaty. Article VII of that treaty is substantially identical to Article IV of the treaty with Mexico. The petitioner in *Peroff,* a United States citizen, characterized the Executive's exercise of discretion to extradite nationals under Article VII as an "administrative determination," and claimed that he was entitled, as a matter of due process, to a hearing before the Secretary of State on the propriety of his extradition.[22] Holding that it would be improper for a court to impose such a hearing requirement, the Fourth Circuit stated:

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[21]Petitioners do not contend that the Secretary of State uses constitutionally impermissible criteria in exercising this discretion.

[22]This hearing would have been in addition to the judicial hearing provided under 18 U.S.C. §3184.

> The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States. Thus, while Congress has provided that extraditability shall be determined in the first instance by a judge or magistrate, 18 U.S.C. §3184, the ultimate decision to extradite is 'ordinarily a matter within the exclusive purview of the Executive.'

563 F.2d at 1102. The court concluded that the requirements of procedural due process were satisfied by the hearing provided under 18 U.S.C. §3184 and by *habeas corpus* review. *Id.* at 1102-03.

[14] The same sensitivity to the Executive's role in foreign affairs, which prompted the *Peroff* court's refusal to prescribe the procedures by which the Executive exercises its discretion over the extradition of nationals, causes us to reject petitioners' argument that this discretion should be confined within specific standards.

[15] Second, contending that a treaty may be modified subsequent to its entry into force by the practice of the parties,[23] petitioners claim that ever since the first extradition treaty between the United States and Mexico was concluded in 1861, both governments have consistently refused to surrender

[23]Without deciding the point, we shall assume *arguendo* that a treaty may be modified by the subsequent practice of the parties. *See, generally,* G. Schwarzenberger, *A Manual of International Law,* 167-68 (5th ed. 1967); 14 Whiteman at 399-406.

their own nationals. Because of this practice, petitioners urge that we hold that Article IV's grant of Executive discretion to deliver up nationals has been repealed. We decline this invitation. Most of the incidents cited by petitioners as evidence of the United States' [24] and Mexico's practice of not surrendering nationals occurred prior to the Supreme Court's 1936 decision in *Valentine v. United States ex rel. Neidecker,* 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5. Yet, in *Valentine,* the court expressly stated that under Article IV, the Secretary of State had discretionary power to surrender United States citizens.[25] *Id.* at 12-17. Indeed, the Court suggested that one of the very reasons the 1899 Treaty was written was

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[24]We note in passing that petitioners' assertion that the United States has consistently refused to extradite its nationals under Article IV is factually flawed. The United States has surrendered its nationals under that Article. *See* 6 Whiteman at 866. As stated in a letter from the American Ambassador at Mexico City to a Mexican official:

> 'Consistent with the long-standing position of the Government of the United States of America . . . the United States has, in addition to the three United States citizens previously mentioned, granted the extradition of United States citizens [to Mexico] over a period of many years [citing several instances].'

Letter from U.S. Ambassador to Mexico, Hill, to Acting Minister of Foreign Relations of Mexico, Gorostiza (Aug. 22, 1960), *quoted in* 6 Whiteman at 879.

[25]The specific question in *Valentine* was whether the 1909 Extradition Treaty with France gave the President power to surrender United States citizens. Holding in the negative, the Court contrasted the French treaty, which did not affirmatively grant such power, with Article IV of the Mexican treaty. 299 U.S. at 12-17, 57 S.Ct. at 104-106.

to give the Executive this power; the 1861 Treaty which it replaced had been interpreted as not giving the Executive authority to extradite United States citizens. *Id.*

Furthermore, the argument that the treaty parties, through their conduct, have expressed an intention to remove the Executive discretion clause from Article IV is substantially undermined by the terms of the recently executed extradition treaty between the United States and Mexico. 17 *Int'l. Legal Materials* 1068 (1978). Article 9 of the new treaty provides:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

While the new treaty does not control this extradition proceeding, see note 1, *supra,* the fact that it invests the Executive with the same discretion as was given under Article IV of the old treaty is evidence that the parties never intended to eliminate this discretion.

[16] Finally, petitioners argue that under due process and equal protection principles, they should not be subject to extradition because Mexico does not

reciprocate by extraditing its nationals. This argument was rejected by the Supreme Court in *Charlton v. Kelley,* 229 U.S. 447, 469-76, 33 S.Ct. 945, 952-955, 57 L.Ed. 1274 (1913), and more recently by the Fourth Circuit in *Peroff v. Hylton,* 563 F.2d 1099, 1102 (4th Cir. 1977). We do the same. The question whether the United States should refuse to extradite its citizens because of Mexico's failure to reciprocate[26] is one for the Executive Branch, note the Courts, to decide.[27]

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[26]The justification often given for the differing practices of the United States and Mexico with respect to extradition of nationals is that the two countries have different concepts of criminal jurisdiction. Mexico, which generally refuses to extradite nationals, has the power, under its laws, to prosecute its citizens for offenses committed abroad. By contrast, the United States, which frequently surrenders its citizens, is generally unable, under its laws, to prosecute its citizens for crimes committed outside its territorial jurisdiction. 6 Whiteman at 876, 878-84. *See also* I.A. Shearer, *Extradition in International Law,* 115 (1971).

[27] In *Charlton,* the Court stated:

> The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

229 U.S. at 476, 33 S.Ct. at____. Similarly, in *Peroff,* the Court ruled that,

> Even if the claimed lack of reciprocity were construed to be a violation of treaty obligations, it would be for the Executive alone to determine whether to waive such violations or to renounce the extradition agreement.

563 F.2d at 1102.

HUMANITARIAN CONSIDERATIONS

[17] Alleging that he may be tortured or killed if surrendered to Mexico, Escobedo asks that we bar his extradition on humanitarian grounds. However, "the degree of risk to [Escobedo's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch. *See Peroff v. Hylton,* 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied,* 429 U.S. 1062 [97 S.Ct. 787, 50 L.Ed.2d 778] (1977) . . ." *Sindona v. Grant, supra,* 619 F.2d at 174.

The district court's order denying the writ of *habeas corpus* is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-1490

D.C. Docket No. 78-2607-Civ-CA

GUSTAVO CASTILLO,
Petitioner-Appellant,

versus

DONALD D. FORSHT, U.S. Marshal,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before MORGAN, ANDERSON and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

August 14, 1980

Issued as Mandate:

[FILED SEP 29 1980]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1490

GUSTAVO CASTILLO,
Petitioner-Appellant,

versus

DONALD D. FORSHT, U.S. Marshal,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING
(September 29, 1980)

Before MORGAN, ANDERSON and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

[Illegible]
United States Circuit Judge